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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1227

MARVIN G. RUSSELL, Receiver,

Petitioner,

vs.

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., Petitioning Creditors, and W. A. FULLER, Receiver, Now Trustee, for S. YOSHINUMA, Bankrupt

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1227

MARVIN G. RUSSELL, RECEIVER,

Petitioner,

vs.

ATLANTA FLOORING & INSULATION CO., INC., ET AL., PETITIONING CREDITORS AND W. A. FULLER, RECEIVER AND TRUSTEE FOR S. YOSHINUMA, BANKRUPT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

The petition of Marvin G. Russell, Receiver in the case of *Oberdorfer Insurance Agency Inc.* v. *S. Yoshinuma,* pending as case number 138423 in the Superior Court of Fulton County, Georgia, respectfully prays this Court to review on writ of certiorari the judgments of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Atlanta Flooring & Insulation Co., Inc., Capitol Fish Company, Alterman Brothers, Inc., Petitioning Creditors, and W. A. Fuller, Receiver, now trustee, for S. Yoshinuma,

Bankrupt *v.* Marvin G. Russell, Receiver, rendered on November 22, 1944, based on a written opinion by the Court, rendered on the same date (R. 45-49); but which judgment only became final on January 30, 1945, when said Court denied petitioner's petition for rehearing (R. 66-74).

I

Summary Statement of Matters Involved

The present litigation arises from a second petition for a turn over between the same parties. The petitioning creditors and the bankruptcy receiver appealed to the Circuit Court of Appeals from an adverse ruling of the District Court on the first petition (United States Circuit Court of Appeals Fifth Circuit #10,626); the judgment of the District Court was affirmed (136 Fed. 2d 457). The petitioning creditors and the bankruptcy receiver then filed their petition for a writ of certiorari in this Court (Case #359, October term, 1943), which was denied (320 U. S. 782, 64 S. Ct. 189).

On the appeal in the present proceeding by the petitioning creditors and the bankruptcy receiver from an adverse ruling by the District Court, it was stipulated between the parties "that the entire record and judgment of the Court (C. C. A.) in case number 10,626 be considered and treated as part of the record in this case for the purposes of argument and reference in the briefs of counsel for both parties, wherever deemed relevant and pertinent, and that the parties in this case on appeal may quote from the record in case number 10,626 in their briefs or argument as freely as if parts quoted were designated and incorporated in this appeal" (R. 27, 28, 35c, 35d, 40, 41, 42).

That record is in this Court in case number 359, October Term, 1943, and petitioner prays reference thereto. Where

necessary petitioner will refer to the record in that case in this Court as "Case 359".

History of the Case

On the 13th day of May, 1942, the Oberdorfer Insurance Agency, Inc., a judgment creditor of S. Yoshinuma, after having exhausted its remedies at law for the satisfaction of its judgment, filed an equitable petition against the said Yoshinuma, in the Superior Court of Fulton County, Georgia, alleging the above (R. 8, case 359), and further pertinent allegations as follows:

(a) "Petitioner alleges that the defendant is insolvent, that he owes to various and sundry creditors in excess of $28,000.00. Of said total indebtedness there is secured to ten creditors the sum of approximately $7,000.00, covering all of the assets which the defendant owns and possesses. The said liens were created at various times and are of different rank and dignity, and cover various and sundry items. Some of the liens are liens on specific items, whereas others cover all of the assets of the defendant. The said liens were made and recorded prior to the time petitioner obtained its said judgment against the defendant. The balance of approximately seventy creditors, which are unsecured and are represented by open account. All of the indebtedness of the defendant, secured or unsecured, is past due and the lienholders will foreclose their mortgages and the unsecured creditors will file suits to enforce their obligations and a multiplicity of suits will result" (R. 29-30).

(b) "Your petitioner further shows that the assets of the defendant consist of valuable improvements made on premises occupied by the defendant, furniture and fixtures, equipment, china ware, silver ware, glass ware, trucks, merchandise, good will, and a lease-hold interest in the premises for a period of ten years" (R. 30).

(c) "Petitioner shows that the defendant is insolvent and that during his absence the business was operated by his wife, and during her management none of the creditors have been paid. That the monies taken in from the operations of the business are expended for current operation, the bills paid in cash, and that no bank account is being maintained on behalf of the defendant" (R. 30).

(d) "Your petitioner, in order to collect its said judgment, ran a garnishment against various banking institutions and it is informed and believes that the defendant maintains no bank account in the City of Atlanta and its judgment cannot be satisfied by that procedure" (R. 30-31).

(e) "Petitioner shows that on account of the prior liens it is unable to have its judgment levied on the property belonging to the defendant, and that in order to collect the same it is necessary that a Court of equity take jurisdiction over the affairs of the defendant and his property and that a receiver be appointed" (R. 31).

(f) "Petitioner brings this bill on behalf of itself and all creditors of the defendant, either similarly or dissimilarly situated, and shows that it is to the best interest of all parties, the defendant, petitioner and all creditors, that a receiver be appointed to operate said business until such time that a prospective customer can be found who is willing and able to purchase said business as a going concern or that said business be liquidated, that if the various lienholders are permitted to foreclose their liens and the unsecured creditors be permitted to file suits that the good will, which is the principal asset of said business, will be destroyed, that no assets will remain to pay your petitioner or other creditors, that on account of the lack of supervision of the defendant's affairs, the federal license may be in jeopardy, but that on the other hand, if a receiver is ap-

pointed to take charge under the supervision of a Court of equity, and operate the said business through a receiver until a final order, judgment and decree can be entered, that said business can be sold as a giong concern or liquidated and the assets marshalled and the creditors paid according to their rank, dignity, and priority, that the creditors will realize all or a substantial portion of the amounts due them" (R. 21-22).

(g) "Petitioner further shows that it has no adequate remedy at law for the enforcement of its judgment against the defendant, and unless a Court of equity will intervene to protect the rights of petitioner, it will suffer irreparable loss, and a multiplicity of law suits will arise" (R. 31).

(h) The prayers of this petition are set out in part in the record in the Court below as follows:

"That a temporary receiver be appointed to take charge of all of the assets belonging to the defendant and especially take charge of the business mentioned in the within and foregoing petition, including any goods, wares, and merchandise used in said premises, and that such temporary receiver be authorized and directed to preserve and protect all the assets of the defendant and be permitted to operate said business; that a permanent receiver be appointed with power to operate and maintain said business; that each of the lienholders be restrained and enjoined from foreclosing or in any wise changing their liens, but be required to intervene in this petition; that all other creditors be allowed, permitted and required to intervene herein and be restrained and enjoined from prosecuting separate actions, and that the respective rights, dignity and priority of all creditors be set up and established herein; that the petitioner have such other and further relief as is equitable and meet in the premises" (R. 22).

(i) The following is a portion of the order of the State Court, dated May 13, 1942, appointing its receiver, as it appears in the record in this case:

"In the meantime, and until further order of this Court, all creditors, their agents or attorneys or other parties are enjoined and restrained from foreclosing their liens, filing suits, or in any wise taking action against the defendant or interfering with his said property other than through interventions in this proceeding. The defendant, his agents and attorneys are restrained and enjoined as prayed for in the foregoing petition" (R. 31).

On the same day, Marvin G. Russell, petitioner here, was appointed receiver by the State Court in said case (R. 31) (R. 39, Case 359). The entire order appears in case number 359; in this case only a portion of the order appears in the record, which is set out under subparagraph (i) above.

On June 25, 1942, Yoshinuma acknowledged service in the State Court suit, and consented to making the receivership permanent, and to the sale by the receiver of his assets (R. 11, Case 359). On September 15, 1942, two days more than four months after the receiver had been appointed by the State Court and taken possession of the assets of the defendant, an involuntary petition in bankruptcy was filed against Yoshinuma, and consenting to be adjudicated a bankrupt, he was, on October 5, 1942, so adjudicated (R. 12, Case 359). On October 6, 1942, Fuller was appointed receiver by the Bankruptcy Court, and instructed to apply to the State Court for a turn over order (R. 32). He applied and was refused (R. 33). He then applied to the Bankruptcy for such an order (R. 32, 33, 34), and his petition was referred to the Referee, as Special Master. In that application for turn over order, the bankruptcy receiver alleged, upon information and belief, "that under the

facts and circumstances of this case, and under the law as applied thereto, he, petitioner, is entitled to possession of said assets" (R. 34); and prayed that the Bankruptcy Court pass an order directing the State Court receiver to turn over "the assets and property of the bankrupt now in their possession and control as State Court receivers" (R. 34). In response thereto, the State Court receiver (Russell) filed his answer, in which he stated "this receiver is respectfully of the opinion that, under Section 2 subsection a(21) of the Acts of Congress Relating to Bankruptcy, as Amended, that the provisions of Section 69 subsection D do not apply to him; and that the jurisdiction of the Superior Court of Fulton County to administer the property in the hands of this receiver until the claims of all the intervenors therein are satisfied, is not affected by the adjudication of the said S. Yoshinuma as a bankrupt" (R. 34). The State Court receiver further answered that "this receiver respectfully calls the attention of this Court to Section 55-309 of the Code of Georgia for 1933, as amended, which is as follows: 'The receiver is an officer and servant of the Court appointing him, is responsible to no other tribunal than said Court and must in all things obey its direction' " (R. 57, Case 359).

On October 23, 1942, the Special Master filed his report, in which he determined and recommended accordingly that the bankruptcy proceeding having been instituted more than four months after the filing of the bill in the State Court, its appointment of the receiver and his taking possession of the res in controversy, the State Court is entitled to retain jurisdiction, and to administer the estate (R. 35) (R. 27, Case 359) (Also see 136 Fed. 2d 457, note).

On November 20, 1942, the District Judge, overruling the objections and exceptions to the Master's report, and making the findings of the Master the order and judgment of

the Court, denied the petition of the bankruptcy receiver (R. 16, Case 359). In announcing its judgment, denying the petition, the District Court, at that time said:

"The Court rules that assuming the valid appointment of the receiver (State Court receiver) more than four months prior to the date of bankruptcy, under the Court's construction of the Bankruptcy Act, the Court has no authority to require the State Court receiver to turn over the property to the receiver appointed by this Court. That is the ruling of the Court" (R. 39-40) (R. 58, Case 359).

The petitioning creditors in the Bankruptcy Court and the bankruptcy receiver appealed the judgment of the District Court, denying the petition, to the United States Circuit Court of Appeals for the Fifth Circuit, and on June 25, 1943, the United States Circuit Court of Appeals for the Fifth Circuit entered its order affirming the judgment of the District Court. (*Atlanta Flooring & Insulation Co., Inc., et al.*, v. *Oberdorfer Insurance Agency, Inc.*, 136 Fed. 2d 457.)

Whereupon, petitioning creditors in bankruptcy and the bankruptcy receiver filed a petition in this Court for writ of certiorari to be directed to the United States Circuit Court of Appeals for the Fifth Circuit to the October term, 1943, of this Court, case number 359; this petition for certiorari was denied. (*Atlanta Flooring & Insulation Co., Inc. et al.* v. *Oberdor Insurance Agency, Inc.*, 64 S. Ct. 189, 320 U. S. 782, Nov. 8, 1943.)

Present Proceeding

Immediately thereafter, the petition for summary turn over order, from which the present litigation arises, was filed in the United States District Court for the Northern District of Georgia, by the petitioning creditors and the re-

ceiver in bankruptcy, and, as amended and rewritten, was dated the 29th day of November, 1943 (R. 2-6). In this second petition for summary turn over order, the petitioning creditors in the bankruptcy case and the bankruptcy receiver sought a turn over order against the State Court receiver for all of the assets in the hands of the State Court receiver, except an amount sufficient to pay the judgment of the original petitioner in the State Court case, including his principal, interest, costs and the fee for the counsel of said petitioner; it being contended by the bankruptcy receiver that all of the claimants who had become parties plaintiff to the State Court bill had done so within four months of bankruptcy and that they were not entitled to have their claims adjudicated and satisfied in the State Court. This contention was made as to creditors claiming security or priority superior to the claim of the original plaintiff in the State Court bill as well as to all other claimants claiming priority or security, as well as those who were simple unsecured contract creditors at the time of the filing of the State Court bill on May 13, 1942 (R. 2-6).

The State Court receiver defended on the grounds:

(a) That under Section 2 subsection a(21) of the Bankruptcy Act that he, as an officer of the Superior Court of Fulton County, Georgia, was not subject to the summary jurisdiction of the Bankruptcy Court for the purposes of the relief sought; (R. 12).

(b) That the petition was res judicata, in that:

(b-1) The issues raised were decided by the District Court on November 20, 1942, and that the judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit;

(b-2) That the judgment of the District Court, on November 20, 1942, and its affirmance by the Circuit Court of Ap-

peals was a decision that the Court was without summary jurisdiction in the premises;

(b-3) That the petition was fatally defective under the principles of estoppel by judgment, the rights sought having been included in the previous turn over petition and were adjudicated by the District Court on November 20, 1942, and that adjudication affirmed, or that the rights sought could and should have been asserted in the previous turn over petition; (R. 13).

(c) That the proceedings were summary proceedings and that the Bankruptcy Court was without summary jurisdiction of the subject matter of the petition or of the respondent; (R. 13).

(d) That the petition, at that time was premature in that it sought a recovery of an unadjudicated quantity, the adjudication of which was in the exclusive jurisdiction of the Superior Court of Fulton County, Georgia; and that the issues necessary for a determination of the quantity sought were therein pending unadjudicated (R. 14).

Evidence

The evidence included all of the facts heretofore set out, as well as all of the evidence and documents before the Court in the previous case, the findings of the Referee, the record before him, and the records before and the judgments of the District Court, and the United States Circuit Court of Appeals were also introduced in evidence, or judicial notice thereof taken by the District Court.

It was also shown that since the previous petition for turn over order, the State Court receiver, under order of that Court, and under due authorization of the Bankruptcy Court, had sold the assets of the bankrupt, realizing therefor the sum of $10,000.00; and that at that time, he had on

hand approximately $10,000.00, which, however, was subject to claims of lien, priority, Court costs and costs of administration before the State Court pending there unadjudicated (R. 3, 7, 8).

The evidence by the bankruptcy receiver's witness was that there were fifty two creditors, who had become parties plaintiff to the State Court case, but that no classification, analysis, or total of the claims asserted had been made. Witness in behalf of the State Court receiver testified that he had examined and made analysis of the claims of the claimants who became parties plaintiff to the case, and found that of the parties plaintiff, eleven claimed to be secured or entitled priority of payment from the funds in the hands of the State Court receiver, and that the claims asserted by them total $9,109.66. He further testified, as attorney for the State Court receiver, that there had been no adjudication of the issues formed in the State Court case by the State Court, that no claims had been adjudicated in the State Court, that there had not been any adjudication of the amount of money, if any, that the State Court receiver should pay to the original plaintiff, Oberdorfer, in the State Court proceeding. (R. 19, 28, 29).

Opinion and Judgment of the District Court on Second Turn Over Petition

At the conclusion of the evidence, the Court stated its opinion from the bench (R. 15), as follows:

"I am inclined to the views in the main presented by the State Court receiver, not as to all of them but as to a sufficient number of them which would impel the Court to decline to grant the turn over order as prayed by the receiver in bankruptcy."

"In the first place, I am of the opinion that in view of the fact that the State Court receiver had possession of the

property, out of which was derived the funds now in his hands, more than four months prior to bankruptcy, that in any event and regardless of any other reason for the ruling, that it would be sufficient to show that this Court does not have jurisdiction by summary proceeding, to divest him of the surplus or of the funds, the criterion of test of jurisdiction being the possession of the property at the time of the institution of bankruptcy. Without exploring fully the full scope of the effect of the former ruling in the case, certainly it was determined that that prossession was valid and proper, and that it originated more than four months prior to bankruptcy, so that the possession of the receiver was legal and in his own right, or in the right of the State Court proceedings at the time of the institution of bankruptcy and, as stated, for that reason, if no other, the Court would not be authorized to proceed by exercise of summary jurisdiction."

"In order that counsel might have the Court's additional views in the matter, I do think that under the Georgia law that the receiver (State Court receiver) in this case is entitled to retain this property, or the funds, until the State Court has made a determination of the effect of the liens, all of which are referred to in the State Court proceedings, and must, of necessity, have anti-dated a (the) filing of State Court proceedings, and therefore be more than four months old, in and of themselves, which without regard to interventions being filed within the four months period, they would relate back to the lien. That is certainly true as to the creditors participating in the State Court proceedings who are proceeding upon lines (liens) * * * more than four months prior to the institution of bankruptcy and in those circumstances, I think that the application, even if the Court had power and * * * it was a proper case

for the exercise of jurisdiction, that it should not be exercised in this proceeding because it would be premature in that the bankruptcy receiver has no right to the funds at this time."

"* * * The Court is further of the opinion, and thought it was so included within the former ruling, that under the provisions of Section 2 subsection a(21), all creditors are put on notice by its terms, that in case of an application for receiver (non-bankruptcy Court), that they must proceed in bankruptcy and avail themselves of the congressional act, and failing in which, that they would have to participate either in the State Court or in some other manner; that the provision of that statute forbids the Bankruptcy Court by summary jurisdiction from requiring the turn over of property which has been in the hands of the State Court receiver appointed more than four months prior to the institution of bankruptcy. * * * That is my view of that provision of (the) bankruptcy statute and for all those reasons the Court declines to grant the petition for turn over order."

Immediately thereafter, the Court entered its order on the petition for summary turn over order brought by the petitioning creditors and the bankruptcy receiver, as follows:

"The above and foregoing motion coming on regularly for a hearing before me, and after hearing evidence and argument thereon and on the motion to dismiss by the State Court receiver, it is the order and judgment of this Court that the above and foregoing motion be and it hereby is denied, on the grounds stated from the bench. This 15th day of December, 1943" (R. 15, 16, 17).

Judgments and Opinions by the United States Circuit Court of Appeals for the Fifth Circuit

The opinion of the Circuit Court of Appeals, affirming the denial of the first petition for turn over order, is printed in the official reports at 136 Fed. 2d 457.

In this proceeding on the second petition for turn over order, the Circuit Court of Appeals reversed the District Court, and entered its judgment and opinion of reversal on November 22, 1944 (R. 45-49).

On the 12th day of December, 1944, the United States Circuit Court of Appeals entered its order staying its mandate in said case, and extending the time for filing petition for rehearing until the 23rd day of December, 1944.

Petition for rehearing was filed in said case by the appellee, petitioner here, on December 20, 1944 (R. 52-65).

The Circuit Court of Appeals entered its order denying the petition for rehearing and a further opinion in said case on January 30, 1945 (R. 66-74).

Thereafter, certain corrections were made in the latter opinion. The word "appellee," last paragraph record 69, was changed to read "appellants." The paragraph at the top of record 70 was changed and rewritten.

II

Jurisdiction

The date of the judgment sought to be reviewed was November 22, 1944 (R. 45-49), but it became final only on January 30, 1945, the date on which the Court below denied petition for rehearing (R. 66-74).

The jurisdiction of this Court is invoked on the grounds that:

(a) The petitioner, in the Courts below, claimed immunity from the jurisdiction of Courts of Bankruptcy un-

der Section 2, subsection a(21) (11 U. S. C. A. 11 a(21)) of the Acts of Congress Relating to Bankruptcy, a statute of the United States, which rights, while sustained by the District Court, were denied by the United States Circuit Court of Appeals for the Fifth Circuit, in conflict with that Section of the Bankruptcy Act, and this Court has not heretofore construed the proviso contained in Section 2, subsection a(21) of the Bankruptcy Act.

(b) The judgment of the Circuit Court of Appeals is final, in that it reversed the holding of the District Court that the Bankruptcy Court, under the Bankruptcy Act, was without authority to require delivery or accounting, and violated the terms of the proviso in subsection a(21) of Section 2 of the Act and the prior judgment on the first petition for return over order.

(c) It is not now necessary to the jurisdiction of this Court that the judgment sought to be reviewed on certiorari be final, in view of the elimination from subsection a of Section 240 of the judicial code of the limitation formerly contained therein, limiting the jurisdiction in certiorari matters to final judgments.

Jurisdiction is invoked under Judicial Code Section 240, as amended (28 U. S. C. A. 347a), and Section 24, subsection c of the Bankruptcy Act (11 U. S. C. A. 47 (c)).

Some of the cases believed to sustain the jurisdiction of the Court, as to Paragraph (b) above are: *Thompson* v. *Dean*, 7 Wall. 346, 19 L. Ed. 95; *Forgay* v. *Conrad*, 6 Howard, 204, 12 L. Ed. 405; *Stovall* v. *Banks*, 10 Wall. 586, 19 L. Ed. 1036; In re: *Farmers Loan & Trust Co.*, 129 U. S. 213, 32 L. Ed. 657.

Generally: *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Stellwagen* v. *Clum*, 245 U. S. 605, 62 L. Ed. 507; *Emil* v. *Hanley*, 63 S. Ct. 687, 318 U. S. 515; *Muffler* v. *Pettigrew Realty Co.*, 132 Fed. 2d 479.

The pertinent provision of Section 2, subsection a(21) of the Bankruptcy Act, referred to above, is the proviso contained therein, the bankruptcy proceeding in this case not being a proceeding under either Chapters X or XII of the Bankruptcy Act, which is as follows:

"Provided, however, that such delivery and accounting shall not be required except in proceedings under Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy."

Questions Involved are Substantial

The question involved here is substantial and of tremendous importance to debtors and creditors alike and to State and Federal Courts, in that the proviso contained in Section 2, subsection a(21) of the Bankruptcy Act defines a clear point at which the jurisdiction of Bankruptcy Courts end and the jurisdiction of the State Courts become paramount and exclusive in cases where bankruptcy follows a proceeding in a State Court, where the Bankrupt's property is in the course of administration. It is important that this Court should clearly and simply define the point beyond which the jurisdiction of the Bankruptcy Court shall not extend, under the provisions of the Bankruptcy Act. There has been a long history of litigation between officers of Bankruptcy Courts and officers of State Courts because of the difficulty of determining conflicting jurisdiction, and this proviso in Section 2, subsection a(21) of the Act was inserted to create a clear, simple and definite limitation upon the effect of bankruptcy for the purpose of eliminating long, drawn-out, expensive litigation between officers of Bankruptcy and State Courts. A construction of the proviso by this Court will save other expensive litigation, not only in this case, but in a multitude of other cases.

III

Reasons Relied On for Allowance of the Writ

(1) The reversal by the United States Circuit Court of Appeals for the Fifth Circuit of the holding by the District Court that under the provisions of Section 2, subsection a(21) of the Bankruptcy Act, the Bankruptcy Court is without jurisdiction, by summary proceedings, to require either delivery or accounting, where the non-bankruptcy receiver was appointed and took possession of the res more than four months before bankruptcy, violates the federal law, as set out in such provision. That proviso has NOT BEEN, but SHOULD BE, CONSTRUED and settled by this Court. This reversal is also in conflict with decisions of other Circuit Courts of Appeal on the same point and with applicable decisions of this Court, which, while not construing the proviso contained in Section 2, subsection a(21) (they having been decided before the enactment of subsection 2(21) of Section 2 of the Act) hold that where the non-bankruptcy receiver or trustee was appointed more than four months before the filing of the bankruptcy petition, the receivership or trustee proceeding will not be superseded, and the non-bankruptcy receiver or trustee need not surrender any property to the Bankruptcy Court unless there proves to be a surplus over and above that necessary to satisfy lienors and claimants in the non-bankruptcy proceeding, including *Sturges* v. *Corwinshield*, 4 Wheat. 122, 4 L. Ed. 529; *Stellwagen* v. *Clum*, 245 U. S. 605, 62 L. Ed. 507; *Metcalf* v. *Barker*, 187 U. S. 165, 47 L. Ed. 122; *Straton* v. *New*, 283 U. S. 327, 75 L. Ed. 1098; *Hoover* v. *Mortgage Co.* (C. C. A. 9th Circuit) 290 Fed. 891; *Clements* v. *Conyers* (C. C. A. 7th Circuit) 32 Fed. 2d 5, Cert. denied 280 U. S. 584, 74 L. Ed. 633; *Park Lane Dresses, Inc.* v. *Haughton & Dutton Co.* (C. C. A. 1st Circuit) 54 Fed. 2d 33; *Matter of Conservative Mortgage &*

Guaranty Co. (C. C. A. 6th Circuit) 24 Fed. 2d 38; *Muffler* v. *Pettigrew Realty Co.* (C. C. A. 6th Circuit, 1943) 52 Am. B. R. (N. S.) 130, 132 Fed. 2d 479, Cert. denied 319 U. S. 766, 63 S. Ct. 1329, 87 L. Ed. 1715; and, also, the following cases from the Fifth Circuit: *Yaryan Naval Stores Co.* v. *Borchardt Co.*, 217 Fed. 758; *Blair* v. *Brailey*, 221 Fed. 1, Cert. denied 238 U. S. 634, 59 L. Ed. 1499; *Neely* v. *McGehee*, 2 Fed. 2d 853.

(2) The first petition for turn over order and judgment thereon was res judicata, or created an estopple by judgment, to the second petition for turn over order. Petitioner here, by his answer to the first petition for turn over order, made an issue that: "Under Section 2, subsection a(21) of the Acts of Congress Relating to Bankruptcy, as amended, the provisions of Section 69 subsection d do not apply to him; and the jurisdiction of the Superior Court of Fulton County to administer the property in the hands of this receiver (petitioner) UNTIL THE CLAIMS OF ALL THE INTERVENORS THEREIN ARE SATISFIED, is not affected by the adjudication of the said S. Yoshinuma as a bankrupt." The District Court in that case sustained that position, holding: "That assuming the valid appointment of the receiver (State Court receiver) more than four months prior to the date of bankruptcy, * * * the Court has no authority to require the State Court receiver to turn over the property to the receiver appointed by this Court." In that case, the District Court made the findings of the Special Master the order and judgment of the Court, after the holding quoted above. The Circuit Court of Appeals, in that case, at 136 Fed. 2d 457, affirmed the judgment, and, after having stated "The Special Master filed his report in which, summarizing the material evidence and carefully and correctly settling down his conclusions of law", added as a note to its opinion that part of the Special Master's

findings are as follows: The bankruptcy proceeding having been instituted more than four months after the filing of the bill in the State Court, its appointment of the receiver and his taking possession of the res in controversy, the State Court is entitled to retain jurisdiction and TO ADMINISTER THE ESTATE." (Capitals ours).

The Court below erred in refusing to hold that the questions raised and decided in the first petition for summary turn over order were res judicata, or created an estopple by judgment, as to the recovery sought in the second petition for turn over order, and therein conflicted with controlling decisions of this Court and of other Circuit Courts of Appeal, including the cases of: *Grubb* v. *Public Utility Commission of Ohio*, 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972; *Henderson* v. *U. S. Radiator Corp.* 78 Fed. 2d 674, Cert. denied 296 U. S. 635, 56 S. Ct. 157, 80 L. Ed. 452; *City of Boston* v. *McGovern* (C. C. A. Mass. 1923) 292 Fed. 705, Cert, denied 265 U. S. 581, 44 S. Ct. 456, 68 L. Ed. 1190; *Southern Minnesota Railway Extension Co.* v. *St. Paul & S. C. R. Co.* 55 Fed. 690, 5 C. C. A. 249; *Doyle* v. *Hamilton Fish Co.* 234 Fed. 47, 148 C. C. A. 63, Cert. denied 243 U. S. 649, 37 S. Ct. 476, 61 L. Ed. 946; *Hamilton Gas Co.* v. *Watters* (C. C. A. W. Va., 1935) 79 Fed. 2d 438; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; *Gould* v. *Evansville & C. R. Co.* 91 U. S. 526, 23 L. Ed. 416.

(3) It was an error and a violation of the petitioner's rights, under the Acts of Congress Relating to Bankruptcy, for the Court to hold (opinion on the petition for rehearing, dated January 30, 1945, R. 71): "It must be conceded that the legal title to the res in controversy is in the trustee in bankruptcy, or will vest in him upon his appointment, which title is not affected by the prior possession of the

State Court receiver; and that the original plaintiff in the State proceeding is an adverse claimant whose lien (whether inchoate, complete, or contingent) was not invalidated by the adjudication in bankruptcy; but what about the intervenors? Some of them may be simple contract creditors, without a lien upon or an interest in the property, who were not entitled to receiver in order that the property might be forthcoming to satisfy their demands." This holding violates the Federal and State law, because the filing and sanction of the State Court bill, the seizure of the res in controversy by the State Court, through its receiver, amounted to an equitable attachment and "levy" within the meaning of that term as it is used in Section 67 (a) of the Bankruptcy Act for the purposes sought to be accomplished by the suit, and established an inchoate lien in favor of all creditors appearing and becoming parties in a reasonable time; and conflicts with the decisions of this Court (cases cited under reason 1), and is contrary to the proper interpretation of Section 70 of the Acts of Congress Relating to Bankruptcy (11 U. S. C. A. 110 a) and is a decision of a question of local law, contrary to local statute, Georgia Code for 1933, as amended, Section 37-407. (Appendix 3, page 52).

(4) The Court below held (Opinion on petition for rehearing, R. 69): "If it is an insolvency proceeding, the burden is on the appellants to show it", and further (opinion on petition for rehearing, R. 69-70): "We need more facts to answer these questions; the correct answer may turn upon the proper construction of the plaintiff's petition (Petition in State Court); if it were before us in its entirety, we might determine its nature; but to expect Courts to decide cases without sufficient facts may be likened to requiring the ancients to make brick without straw." After

holding that the burden was on the appellants and that appellants had not furnished the Court with sufficient evidence, the Court held in favor of the appellants and reversed the judgment of the Court below in favor of the appellee, and assessed the costs of the appeal against the appellee (Petitioner here). This holding amounts to a holding that the burden was on the appellants to furnish the Court with sufficient evidence to sustain the contentions made by them in their petition for turn over order, and it amounts to a holding that sufficient evidence was not furnished. This was error and it was harmful and prejudicial to the appellee because it is elementary that when a party fails to carry the burden of proof resting on him, the judgment should go against him and not against his opponent (Petitioner here), and therein conflicted with the controlling decisions of this Court and of other Circuit Courts of Appeal, including the cases of: *Pennsylvania Railroad Company* v. *Chamberlain*, 53 S. Ct. 391, 288 U. S. 333, 77 L. Ed. 819; *Astor* v. *Wells*, 17 U. S. 466, 4 Wheat. 466, 4 L. Ed. 616; *Deadrich v. U. S.* (C. C. A. Nev. 1935) 74 Fed. 2d 619; *Shapleigh* v. *United Farms Co.*, (C. C. A. Texas, 1913) 100 Fed. 2d 287; *Spain* v. *Powell* (C. C. A. Va. 1937) 90 Fed. 2d 380.

(5) The United States Circuit Court of Appeals for the Fifth Circuit, in its opinion and judgment of reversal, although the same was applicable and controlling, made no reference to Section 2, subsection a(21) of the Bankruptcy Act (11 U. S. C. A. 11 a(21)), or to the fact that the application of such Section was invoked by the petitioner in the District Court, applied there, argued in petitioner's brief, and insisted upon in petitioner's application for rehearing (R. 52). This was error and was harmful and prejudicial to petitioner. We respectfully urge that this constitutes such a departure from the accepted and usual course of

judicial proceedings, as to call for an exercise of this Court's power of supervision.

WHEREFORE, because said decision and judgment of the United States Circuit Court of Appeals for the fifth Circuit decided the foregoing federal questions erroneously and contrary to the decisions of this Court and the decisions of other United States Circuit Courts of Appeal, and because the proviso in subsection a(21) of Section 2 of the Bankruptcy Act has not been, but should be, construed and settled by this Court, your petitioner, upon this petition, upon the annexed brief, and upon a certified transcript of all proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, prays that a writ of certiorari be issued to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed.

MARVIN G. RUSSELL,
Receiver in the case of Oberdorfer Insurance Agency Inc. v. S. Yoshinuma, pending as case number 138423, in the Superior Court of Fulton County, Georgia,

By H. A. ALEXANDER,
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